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No. 10-1125

In The

Supreme Court of the United States

DANIEL GUGGENHEIM, ET AL.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief in support of Petitioner.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). It also has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive

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[1] Under Rule 37.6 of the Rules of this Court, *Amicus* state(s) that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of the intent to file the brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

NAHB's organizational policies have long advocated that property owners must be able to challenge unconstitutional regulations. Central to this issue is the principle that property interests are not solely dependent on temporal aspects of property ownership. NAHB members frequently face regulation that eliminates the economically viable use of their property, and it supports the ability of any property owner to challenge unconstitutional conditions that have been imposed on, rather than created by, a property owner.

The Court should grant certiorari to clarify that *Palazzolo* applies to all subsequent property owners, regardless of how they came to hold title. Correcting the Ninth Circuit's attempt to deprive yet another group of property owners access to the Fifth Amendment's Takings Clause is essential given the myriad of roadblocks that already block the path to the courthouse door.

SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit attempts to unreasonably limit this Court's determination that a "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). Specifically, the Ninth Circuit seeks to apply this principle only to a relatively small segment of property owners—those who obtained land by operation of law from predecessors in title who had already brought a state law takings

claim. Such a narrow interpretation is contrary to the intention that property owners' constitutional rights have continuity and uniformity.[2]

The Ninth Circuit's formulation not only violates the principles enunciated in *Palazzolo*, but also fails to comport with nationwide state law precedent that constitutional rights, including regulatory takings claims, run with the land.

ARGUMENT

I. The Court Below Misconstrued *Palazzolo v. Rhode Island*, Unreasonably Limiting the Availability of the Fifth Amendment.

The Ninth Circuit has found a new way to prevent property owners from bringing regulatory takings claims. It badly misconstrued two aspects of this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). As a result, the Ninth Circuit has ignored this Court's admonition against a rule that "would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 627.

First, the Ninth Circuit seeks to limit the availability of the Fifth Amendment to property owners who obtain title to their land after the enactment of a regulation. In the decision below,

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[2] Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 546 (Summer 2002) ("The buyer's rights are subject to legitimate regulation, but cannot be extinguished by dint of a preexisting statute.").

such post-enactment property owners can only bring a regulatory takings claim under a narrow set of factual circumstances. *Guggenheim v. City of Goleta*, 2010 WL 5174984 (9th Cir. Dec. 22, 2010). This rationale fundamentally alters the plain meaning of this Court's decision in *Palazzolo*.

Second, the Ninth Circuit ignored substantial state law precedent that regulatory takings claims run with the land. Section II explains that these decisions clearly show the Ninth Circuit's analysis would not only eliminate the ability of many property owners to challenge unconstitutional regulations, but would also have negative consequences to effective land use planning.

In the decision below, the Ninth Circuit imposed a test where most subsequent title holders with notice of existing regulations are foreclosed from bringing regulatory takings claims. Under this test, post-enactment purchasers only have viable regulatory takings claims when a transfer occurs "by operation of law, during the period of time when the owner was ripening the claim by exhausting state remedies." *Guggenheim*, 2010 WL 5174984 at *4. Thus, when a property owner purchases land in an arms-length transaction, they lose the right to just compensation as to any existing regulations. Moreover, the previous title holder must have been actively pursuing a regulatory takings claim in state court.

Under the Ninth Circuit's test, notice of pre-existing regulations is *per se* fatal to a property owner's regulatory takings claim in the vast majority of circumstances. Indeed, because the Guggenheims

purchased their property on the open market, the Ninth Circuit explained that this eliminates their right to challenge the constitutionality of the regulation.

This holding misconstrues *Palazzolo* because the Court did not make a hard and fast distinction between post-enactment owners who acquired property by operation of law as compared to on the open market. Rather, *Palazzolo* correctly points to post-regulatory enactment owners who received title to property while their predecessor sought to ripen a regulatory takings claim as a particularly egregious example of where a *per se* regulatory notice rule would be unfair. *Palazzolo*, 533 U.S. at 627-628.

In fact, this Court acknowledges that a post enactment *purchaser* may still have a valid regulatory takings claim because some "enactments are unreasonable and do not become less so through passage of time or title." *Id.* at 627. While this analysis does not eliminate the inherent risk of government regulation, it stands for the proposition that regulation can have a lingering confiscatory effect even when property is purchased with full knowledge of the regulation's existence.[3] Courts simply cannot assume, as the Ninth Circuit did, that

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[3] "Palazzolo holds that the fact that a claimant's expectations should have been reduced by what she knew of an existing land-use regulatory scheme prior to purchasing her land cannot bar her claim entirely, which allows a claimant to pass the threshold requirement that some property interest has been taken away." Eric D. Albert, *If the Shoe Fits, [Don't] Wear it: Preacquisition Notice and Stepping Into the Shoes of Prior Owners in Takings Cases After Palazzolo v. Rhode Island*, 11 N.Y.U. Envtl. L. J. 758, 767-768 (2003).

the inherent cost of existing regulations have been bargained for when property is purchased.

Justice O'Connor's concurrence in *Palazzolo* also shows that the Ninth Circuit missed the point in *Guggenheim*. Justice O'Connor explained that *Palazzolo* "does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry." *Id.* at 635-36 (O'Connor, J., concurring).

The Ninth Circuit, in contrast, seeks to use pre-acquisition notice as a *per se* test for investment backed expectations in all but the narrow circumstances described above. In its investment-backed expectations analysis, the court determined that, because the Guggenheims had knowledge of the rent control ordinance's restrictions, they could not have investment backed expectations. *Guggenheim*, 2010 WL 5174984 at *5. Because this notice existed, the Ninth Circuit failed to examine the reasonableness of the ordinance itself. By brushing aside such considerations, the Ninth Circuit failed to "attend to those circumstances which are probative of what fairness requires in a given case." *Palazzolo*, 533 U.S. at 635.

The Ninth Circuit's willful blindness to this approach is surprising given this Court's consistent application of a case-by-case analysis to pre-acquisition notice in the context of regulatory takings claims.

For example, in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002),

the Court reiterated that the investment-backed expectations prong of *Penn Central* depended on a number of factors, including how long a regulation has been in effect. *Id.* at 326-37. *Tahoe-Sierra* acknowledged that how long a regulation has been in effect does not always correlate to whether a taking has occurred.

The Ninth Circuit has not only misconstrued *Palazzolo,* but has also gone against the grain of other decisions by this Court. A *per se* notice defense was categorically rejected in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987). In *Nollan,* this Court rejected the argument that the property owners could not challenge an exaction because it existed at the time the owner purchased the property. *Id.* at 833. The existence of the Coastal Act—which enabled the exactions at issue—did not serve to eliminate the Nollan's property rights.[4] This Court then expressly applied *Nollan's* holding to *Penn Central* takings in *Palazzolo.*[5]

The Federal Circuit and the United States Court of Federal Claims, which have been on the vanguard of this issue, have reached the opposite conclusion to the Ninth Circuit. For example, a recent Federal Circuit case echoed Justice O'Connor, stating that

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[4] "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan*, 483 U.S. at 833 n.2.

[5] A claim under *Penn Central* is "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo*, 533 U.S. at 630.

"knowledge of [a] regulation is not per se dispositive, although it is a factor that may be considered, depending on the circumstances." *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009).[6]

Similarly, the United States Court of Federal Claims explained that the investment-backed expectations analysis for a post-enactment purchaser should not merely focus on the purchaser's knowledge, but must also look to the specific facts of the regulatory scheme at issue. *Norman v. United States*, 63 Fed. Cl. 231, 266 (Fed. Cl. 2004). While the court ultimately found no taking, it conducted an exhaustive analysis of whether the property owners had a reasonable expectation to develop property under the Clean Water Act.

The Ninth Circuit's test under *Guggenheim* simply does not account for these nuances of property ownership. For this reason, *Guggenheim* failed to heed Justice O'Connor's statement that notice of an existing regulation is only a non-dispositive factor in the broader investment-backed expectations analysis.

Thus, the Ninth Circuit's test simply does not allow for a meaningful investment-backed expectation analysis for post-enactment purchasers. This not only turns the clock back on this Court's decision in *Palazzolo*, but it also ignores a long line

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[6] *See also, Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cl. 2004) (applying a facts and circumstances analysis to a post-enactment regulatory takings claim).

of state law precedent regarding the rights of ownership that pass with title.

II. Because Regulatory Takings Claims Run With the Land, All Subsequent Property Owners are Entitled to Challenge Existing Regulations Under the Fifth Amendment.

Courts have held that later property owners retain the right to bring constitutional challenges relating to existing conditions on the land.[7] Therefore, a subsequent title holder may challenge unconstitutional conditions to the use of his land, regardless of when those conditions were imposed.

In the context of regulatory takings, this principle is based on the notion that "an owner has a reasonable investment-backed expectation that land use and development will not be burdened by unconstitutional development restrictions." Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *1 Rathkopf's The Law of Zoning and Planning* § 6:30 (4th ed. Supp. 2011). Regulatory takings claims, in other words, run with the land. State courts have frequently upheld this principle in the context of challenges to land use regulations.[8]

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[7] These decisions "generally hold that a later owner may successfully assert a regulatory taking[s] claim unless the hardship in question was truly self-created by the owner or a predecessor in title and not by simply government regulatory action." *Id.*

[8] *See, e.g. Negin v. Bd. of Bldg and Zoning Appeals of City of Mentor, et al.*, 433 N.E.2d 165 (Ohio 1982) (pre-existing minimum lot size ordinance resulted in a taking); *Czech v. City*

A New Jersey appeals court applied the same principles to determine that, while reasonable investment-backed expectations include notice of existing regulations, property rights with regard to those regulations generally pass to subsequent property owners. *Karam v. State, Dept. of Envtl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), abrogated on other grounds by *Panetta v. Equity One, Inc.*, 920 A.2d 638 (N.J. 2007). The court explained that "[T]he right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Id.*

An earlier New Jersey case came to a similar conclusion. In *Moroney v, Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993), property owners sought a lot size variance based on an ordinance that existed at the time they purchased the property. The court rejected the municipality's argument that the property owner had no investment-backed expectations because they knew of the zoning restriction prior to purchasing the property. *Id.* at 1049. The court explained that "[w]here the owner or predecessor in title has not created the hardship, the focus is upon the property and not the owner." *Id.* This rule takes into account the fact that there are often valid circumstances were prior property

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of Blaine, 253 N.W.2d 272 (Minn. 1977) (holding that taking occurred where property owner denied rezoning of mobile home ordinance).

owners are not able to bring regulatory takings claims.[9]

In other words, the Ninth Circuit's attempt to divest an entire class of property owners from the principle that takings claims run with the land will create an unfair result. Commentators have noted that these holdings undermine the integrity of the Fifth Amendment itself.[10]

In fact, it is only appropriate to divest a new property owner of her constitutional rights when she has created her own hardship. Notice of a regulation alone, however, does not result in a self created hardship.

In *Richard Roeser Prof'l. Builder, Inc. v. Anne Arundel County*, 793 A.2d 545 (Md. 2002), a property

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[9] "There are many reasons why a prior owner might not have pursued a taking[s] claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim." *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1043 (N.Y. 1997) (Wesley, J., concurring); *see also, Ward et al. v. Bennett, et al.*, 592 N.E.2d 787, 790 (N.Y. 1992) (holding that property owner was entitled to have their takings claim adjudicated).

[10] *See* Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. Land Use & Environmental L. 161, 195-196 (Fall 1997) ("If the Fifth Amendment's Takings Clause is to have any meaning, decisions affecting its application must be universally understood and accepted . . . There can be no exceptions to the Takings Clause for new owners, nor can property be redefined any time a statute or ordinance is passed or a zoning decision made. Such conditions risk reducing the Takings Clause to a hollow shell.").

owner contended that the denial of a variance from an existing environmental critical area resulted in a taking. An appeals court held that the owner had created his own hardship by seeking a variance with full knowledge of the development restrictions.

The Court of Appeals of Maryland disagreed, holding that the builder's knowledge of regulations prior to the purchase of the property was not a self-created hardship. Citing *Palazzolo,* the court held that a subsequent purchaser continued to be entitled to just compensation where a cognizable takings claim exists. The court noted that "hardships that are normally considered to be self-created in cases of this type do not arise from purchase, but from those actions of the landowner, himself or herself, that create the hardship, rather than the hardship impact, if any, of the zoning ordinance on the property." *Id.* at 558.

The Ninth Circuit in *Guggenheim* has rejected the widely held principle that regulatory takings claims run with the land for all subsequent title holders.[11] As a result, the availability of the Fifth Amendment has, for all practical purposes, been eliminated for an entire class of property owners. The *Guggenheim* decision also creates adverse policy

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[11] "[A]pplication of the regulatory notice rule typically causes a stick in the bundle of rights held by the pre-enactment purchaser—the right to make use of land in particular ways or obtain compensation—to disappear upon transfer of title." J. David Breemer and R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck,* 34 Sw. U. L. Rev. 351, 384 (2005).

results for both property owners and local communities.

Massachusetts' high court addressed this issue in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994). In *Lopes*, the court upheld the property owner's regulatory takings case against an existing zoning ordinance even though the owner has purchased the land with full knowledge of environmental buffers that would limit the property's development potential. *Id.* at 1313. The court explained that:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them . . . would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Id. at 1315. The Ninth Circuit's decision will lead to exactly this problem. Any property owner who purchased their land after enactment of a statute or regulation would result in zoning laws having different effects on different property owners depending solely upon when they purchased the land.

In addition, the Ninth Circuit's paradigm creates moral hazards in the context of land development. Specifically, property owners will be incentivized to

develop property sooner than appropriate to avoid a notice preclusion rule like that in *Guggenheim*. [12]

Incentivizing the development of land prematurely is problematic for both property owners and local government. This creates unnecessary hardships for property owners and results in poorly planned land use and development. The alternative risk is that future property owners will be foreclosed from challenging unconstitutional land use controls. That result should be equally unacceptable to this Court.

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[12] J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?* 38 Urb. Law 81, 98 (Winter 2006) ("When the landowner has acquired property prior to regulation, and is therefore not subject to the standard regulatory notice rule, state courts may nevertheless deem development expectations unreasonable if the claimant delayed building until after a preclusive regulatory regime went into effect.").

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

Bd. of Envtl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Sackett v. United States Environmental Protection Agency*, (2011) (No. 10-1062).